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### Cover Page Footnote

J.D. Candidate at Yale Law School (expected 2015). The author is grateful to Professor Eugene Fidell at Yale Law School for invaluable guidance and to David Selden at the Native American Rights Fund for research support.

## NO TRIBAL COURT IS AN ISLAND? CITATION PRACTICES OF THE TRIBAL JUDICIARY

Rose Carmen Goldberg\*

*"Modern tribal courts have the unenviable task of doing justice in two worlds. They must be familiar with and incorporate traditional practices in order to maintain internal credibility with the very tribal members that they are appointed to serve, and simultaneously appease the non-Indian judicial world."*

- Tribal Court Judge BJ Jones<sup>1</sup>

### INTRODUCTION

Tribal courts' position at the intersection of two worlds is indeed unenviable. And it might be even more complex than tribal court Judge BJ Jones' statement suggests. One of the worlds in which tribal courts do justice, the world of tribal law and custom, might not respect tribal boundaries. Instead of restricting their gaze to their own jurisprudence, tribal courts might look to other tribes for guidance.<sup>2</sup> Tribal court judges might cite other tribes' opinions<sup>3</sup> for several reasons. For one, issues that arise under tribal law may not be common subjects of adjudication in United

\* J.D. Candidate at Yale Law School (expected 2015). The author is grateful to Professor Eugene Fidell at Yale Law School for invaluable guidance and to David Selden at the Native American Rights Fund for research support.

<sup>1</sup> B.J. Jones, *Tribal Courts: Protectors of the Native Paradigm of Justice*, 10 ST. THOMAS L. REV. 87, 87 (1997).

<sup>2</sup> Frank Pommersheim, *Liberation, Dreams, and Hard Work: An Essay on Tribal Court Jurisprudence*, 1992 WIS. L. REV. 411, 453 (1992) ("Tribal precedents from other reservations, however, may also be relevant."); according to WestlawNext's tribal government product sales website "[r]ecent decisions now evidence tribal courts citing other tribes when crafting opinions. This has created a demand for a systematic, professional compilation of cases from tribal law courts." WESTLAWNEXT, <http://legalsolutions.thomsonreuters.com/law-products/practice/government/tribal-government> (last visited Nov. 18, 2014).

<sup>3</sup> Throughout this article, this practice is referred to as "intertribal citation."

States courts.<sup>4</sup> For instance, tribal membership does not have a full equivalent in the United States legal system.<sup>5</sup> Other tribal courts, however, might have extensive rulings on such matters. In addition, some tribal courts are young<sup>6</sup> and do not have many previous decisions of their own to draw upon. With similar effect, some tribes might not have the resources to maintain records of prior adjudications in accessible formats, or at all.<sup>7</sup> To the extent that such tribes want to ground their rulings in legal precedent, they must look outward. Looking to other tribes' courts, as opposed to United States courts, might help them maintain internal legitimacy insofar as other tribes' opinions might be more consistent with their traditions than United States courts'.<sup>8</sup>

Yet there are barriers to intertribal citation that might reduce its incidence. Some tribal courts' opinions may not be available to other tribes because resource limitations preclude dissemination.<sup>9</sup> Alternatively, some tribes might not want their jurisprudence to be publicly available, irrespective of resource requirements. This insularity could be motivated by privacy concerns, fear of ridicule, or a tribal tradition of non-public mediation. Moreover, citing tribal courts themselves might be unable or hesitant to look to other tribes' opinions, for similar reasons. Other tribal courts' opinions might only be available through databases with subscription

<sup>4</sup> Throughout this article, "U.S. courts" refers to all courts within the U.S. (e.g., the Supreme Court, Federal courts, state courts) *except* for tribal courts.

<sup>5</sup> Tribal membership disputes often turn on blood quantum determinations, for which there is no close analogy in U.S. state or national citizenship adjudications. For more information about tribal membership and blood quantum criteria, see Carole Goldberg, *Members Only? Designing Citizenship Requirements for Indian Nations*, 50 U. KAN. L. REV. 437 (2002).

<sup>6</sup> See, e.g., Pommersheim, *supra* note 2, at 454 ("In light of many tribal courts' relative youth, much tribal court litigation involves cases in which there is no controlling authority."); see also Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 33 TULSA L.J. 1, 2 (1997).

<sup>7</sup> See, e.g., Maria Odum, *Money Shortage Seen as Hindering Indian Justice*, N.Y. TIMES, Oct. 4, 1991, at B9 ("legal research on precedents is difficult because, due to lack of money, the volume reporting the past three years of judgments in the Indian tribal court system never went to press"); Elizabeth E. Joh, *Custom, Tribal Court Practice, and Popular Justice*, 25 AM. INDIAN L. REV. 117, 124 (2001) (characterizing tribal courts as "dismally underfunded"); Gloria Valencia-Weber, *Tribal Courts: Custom and Innovative Law*, *Indian Law Symposium*, 24 N.M. L. REV. 225, 263 n.40 (1994) ("The scarcity of resources is a constant barrier.").

<sup>8</sup> Valencia-Weber, *supra* note 7, at 254 ("Sometimes customary tribal law will produce results different from an Anglo-American court's determination because the substantive law arises from a fundamentally different view on the matter at issue. In the use of tribal trust lands and in probate distribution of property there is an important difference. The Anglo-American concept of property as individualized ownership and exploitation is not germane.").

<sup>9</sup> Pommersheim, *supra* note 2, at 450, 456 n.161 ("[P]ractitioners often exhibit a lack of familiarity with the precedent of the very court they are practicing before. This problem is often exacerbated by irregular publication of opinions in the Indian Law Reporter.").



fees that some tribes find prohibitive.<sup>10</sup> And even if the citing tribal court has access, the research and process of applying the other tribe's opinion to the case at hand might be too time-intensive. Additionally, some tribes may have historical or current conflicts that make intertribal citation politically unsavory.<sup>11</sup> Finally, some tribal judges might stand with Justice Scalia in staunch opposition to citation of "foreign" courts,<sup>12</sup> and may consider other tribes foreign for citation purposes. According to this view, judicial opinions are based on laws that uphold particularized cultural norms, and as such, are not applicable beyond the deciding court's jurisdiction.<sup>13</sup>

This article examines how tribal courts manage their "unenviable task"<sup>14</sup> of doing justice in multiple worlds through the lens of citation practices. In so doing, it sheds light on the current state of tribal court jurisprudence and provides a preliminary empirical basis to guide needed reforms. It also enriches the body of scholarship on judicial citations—while much of the literature engages in theoretical debate about the functions and effects of citations, this article documents and dissects actual practices. By contributing to a fuller picture of *how* citations are used, this article brings this line of inquiry closer to answering the underlying question of *why*.

The article begins with a background section that consists of three subparts. The first provides a brief overview of tribal courts, to situate the article's tribal court citation research findings. The second two subparts survey the existing literature on judicial citations generally, and on tribal court judge citation practices in particular. Part I begins the article in earnest by detailing the citation review methodology and also provides an overview of the availability of tribal court opinions. Part II presents the research findings, starting with a summary of results, moving to a more detailed analysis of intertribal citations, and concluding with brief discussions of the article's findings on citation of United States and foreign courts.

<sup>10</sup> See, e.g., WestlawNext's fee-based "Tribal Cases" database at <http://info.legalsolutions.thomsonreuters.com/westlawnext/> (last visited Nov. 18, 2014).

<sup>11</sup> See, e.g., Robert A. Williams, Jr., *Linking Arms Together: Multicultural Constitutionalism in A North American Indigenous Vision of Law and Peace*, 82 CAL. L. REV. 981, 992 (1994) (discussing the "Beaver Wars" fought between the Iroquois and Algonquians in the 1700s).

<sup>12</sup> See, *Roper v. Simmons*, 543 U.S. 541, 608 (2005) (Scalia, J., dissenting).

<sup>13</sup> See, e.g., Steven G. Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1337 (2006).

<sup>14</sup> Jones, *supra* note 1.

Part III concludes the article by discussing the implications of the study's research findings. The findings suggest that tribal courts have responded to their unenviable position at the intersection of two worlds by retreating to one—intertribal citation is exceedingly rare. In conclusion the article argues that these low citation rates are likely a function of tribal courts' limited access to court opinions and highlights the importance of removing barriers to access. A short addendum recommends several avenues for future research that could contribute to concrete improvement in tribal courts' access to "justice."

## I. BACKGROUND

### A. Tribal Courts

Today, more than 250 tribes operate their own court systems,<sup>15</sup> adjudicating on behalf of an estimated one<sup>16</sup> to two<sup>17</sup> million people. These tribal courts<sup>18</sup> resemble their United States court counterparts to varying degrees. The majority of tribal courts operate in near full conformity with prevailing formal adversarial processes.<sup>19</sup> Professional and sometimes United States law school trained<sup>20</sup> judges preside, and adjudication usually results in clear winners and losers.<sup>21</sup> In addition, some tribes' court systems contain hierarchical levels of appellate review that more or less mirror the United States court system's tiered model.<sup>22</sup> A lesser number of tribal courts still practice traditional forms of dispute resolution, such as "Elder Council"<sup>23</sup> mediation or "peacemaking."<sup>24</sup> Elder Councils

<sup>15</sup> Matthew L. M. Fletcher, *Toward a Theory of Intertribal and Intratribal Common Law*, 43 HOUS. L. REV. 701, 718 (2006).

<sup>16</sup> O'Connor, *supra* note 6, at 1.

<sup>17</sup> Odum, *supra* note 7.

<sup>18</sup> Throughout this article, courts operated by tribes are referred to as "tribal courts."

<sup>19</sup> Robert B. Porter, *Strengthening Tribal Sovereignty Through Peacemaking: How the Anglo-American Legal Tradition Destroys Indigenous Societies*, 28 COLUM. HUM. RTS. L. REV. 235, 237 (1997).

<sup>20</sup> Valencia-Weber, *supra* note 7, at 240.

<sup>21</sup> Valencia-Weber, *supra* note 7, at 250.

<sup>22</sup> For instance, the Navajo Nation court system is two-tiered, THE NAVAJO NATION JUDICIAL BRANCH, <http://www.navajocourts.org/> (last visited Nov. 18, 2014) ("The Navajo Nation operates a two-level court system: the trial courts and the Navajo Nation Supreme Court, which is the appellate court."), and the Confederated Tribes of the Colville Reservation also have a two-tiered system, COLVILLE TRIBES TRIBAL COURTS, [http://www.colvilletribes.com/tribal\\_courts.php](http://www.colvilletribes.com/tribal_courts.php) (last visited Nov. 18 2014) ("The Tribal Court consists of a trial court and the Colville Tribal Court of appeals.").

<sup>23</sup> See, e.g., Stacy L. Leeds, *Cross-Jurisdictional Recognition and Enforcement of Judgments: A Tribal Court Perspective*, 76 N.D. L. REV. 311, 363 n.278 (2000); Matthew L.M. Fletcher, *Rethinking Customary Law in Tribal Court Jurisprudence*, 13 MICH. J. RACE & L. 57, 66 (2007).

<sup>24</sup> Christine Zuni, *Strengthening What Remains*, 7 KAN. J.L. & PUB. POL'Y 17, 19 (1997).

and peacemaking courts are characterized as using community mediators instead of judges and basing resolution on unwritten customary law.<sup>25</sup> They are also commonly viewed as focusing on restoring harmony to the tribe as a community,<sup>26</sup> as opposed to United States courts' emphasis on delivering justice in accord with individual rights and obligations.<sup>27</sup> Mainly because of lack of resources, parties in tribal court proceedings are frequently not represented by counsel.<sup>28</sup>

Enactment of the Indian Reorganization Act (IRA) in 1934<sup>29</sup> marked the birth of the tribal court systems that operate on reservations across the country today.<sup>30</sup> The IRA empowered tribes to adopt their own constitutions, and many tribes adopted constitutional provisions creating tribal courts.<sup>31</sup> These courts replaced almost all of the federal government-run "Courts of Indian Offenses" that had previously been the principal legal forums for reservations.<sup>32</sup> The Courts of Indian Offenses, which still serve a limited number of tribes,<sup>33</sup> operate according to the United States court-style adversarial model. The continued existence of some of these courts has been the subject of much criticism.<sup>34</sup>

Tribal courts' jurisdiction is limited. They do not have inherent jurisdiction over non-Indians in criminal cases.<sup>35</sup> Rather, this authority requires explicit congressional authorization.<sup>36</sup> Congress recently provided just such a grant in the context of domestic violence. The Violence Against Women Reauthorization Act of 2013 gives tribal courts the power to convict non-Indians who assault Indian

<sup>25</sup> See, e.g., Joh, *supra* note 7, at 124-125.

<sup>26</sup> *Id.* at 123.

<sup>27</sup> Porter, *supra* note 19, at 251.

<sup>28</sup> Odum, *supra* note 7.

<sup>29</sup> 25 U.S.C. §§ 461-79 (2006); Valencia-Weber, *supra* note 7, at 236.

<sup>30</sup> Pommersheim, *supra* note 2 at 417.

<sup>31</sup> Zuni, *supra* note 24, at 20-21.

<sup>32</sup> Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285, 291 (1998).

<sup>33</sup> BJ Jones, *Role of Indian Tribal Courts in the Justice System*, INDIAN CHILD TREATMENT TRAUMA CENTER (Mar. 2000) at 1, <http://www.icctc.org/Tribal%20Courts.pdf>.

<sup>34</sup> See, e.g., Gavin Clarkson, *Reclaiming Jurisprudential Sovereignty: A Tribal Judiciary Analysis*, 50 U. KAN. L. REV. 473, 477 (2002) ("From the beginning, many recognized that "there was, at best, a shaky legal foundation for these tribunals. There was no statutory authorization for the establishment of such courts...."); Aaron F. Arnold et al., *State and Tribal Courts: Strategies for Bridging the Divide*, 47 GONZ. L. REV. 801, 808 (2011).

<sup>35</sup> *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978).

<sup>36</sup> *Id.* at 208 ("Indians do not have criminal jurisdiction over non-Indians absent affirmative delegation of such power by Congress.").

partners or spouses or who violate a protection order.<sup>37</sup> However, tribal courts are still subject to limitations in the criminal sentences and fines they can adjudge. Until recently, the Indian Civil Rights Act (ICRA) restricted tribal imprisonment orders to one year and fines to \$5,000 per offense.<sup>38</sup> These limits were increased by the Tribal Law and Order Act of 2010.<sup>39</sup>

Tribal courts' central mandate is to apply tribal law.<sup>40</sup> Tribal law includes codes,<sup>41</sup> constitutions,<sup>42</sup> tribal common law,<sup>43</sup> and customary law.<sup>44</sup> While tribal courts are not directly bound to uphold the United States Constitution, ICRA provides parties in tribal court proceedings with protections similar to those in the Bill of Rights.<sup>45</sup> For instance, ICRA requires tribal courts to provide a jury trial to anyone charged with a criminal offense for which incarceration is a possible penalty and to consider the accused as having a right to remain silent.<sup>46</sup> However, federal court review of tribal court decisions is only available after tribal court remedies have been exhausted or through habeas corpus claims.<sup>47</sup>

<sup>37</sup> Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. § 904 (2013) (enacted).

<sup>38</sup> Indian Civil Rights Act, 25 U.S.C. § 1302 (2006).

<sup>39</sup> Tribal Law and Order Act of 2010, 25 U.S.C. § 2801 (Supp. IV 2010).

<sup>40</sup> Judith V. Royster, *Stature and Scrutiny: Post-Exhaustion Review of Tribal Court Decisions*, 46 U. KAN. L. REV. 241, 279 (1998).

<sup>41</sup> See, e.g., Yurok Tribal Code, Yurok Tribal Council Ordinance, [http://www.yuroktribe.org/documents/YurokTribalCouncilOrdinance\\_v13.pdf](http://www.yuroktribe.org/documents/YurokTribalCouncilOrdinance_v13.pdf) (last visited Nov. 18, 2014); Swinomish Tribe Criminal Code, <http://www.swinomish-nsn.gov/government/tribal-code/title-4-criminal-code.aspx> (last visited Nov. 18, 2014).

<sup>42</sup> See, e.g., Constitution of the Cherokee Nation, <http://www.cherokee.org/Portals/0/Documents/2011/4/308011999-2003-CN-CONSTITUTION.pdf> (last visited Nov. 18, 2014); Minnesota Chippewa Tribe Constitution [http://www.llojibwe.org/government/mctDocs/constitution\\_revised.pdf](http://www.llojibwe.org/government/mctDocs/constitution_revised.pdf) (last visited Nov. 18, 2014).

<sup>43</sup> See, e.g., Valencia-Weber, *supra* note 7, at 245.

<sup>44</sup> Fletcher, *supra* note 23, at 57 (“[T]he importance of customary law in American Indian tribal courts cannot be understated.”).

<sup>45</sup> *Talton v. Mayes*, 163 U.S. 376 (1896); 25 U.S.C. §§ 301-1341 (2006); B.J. Jones, *Welcoming Tribal Courts into the Judicial Fraternity: Emerging Issues in Tribal-State and Tribal-Federal Court Relations*, 24 WM. MITCHELL L. REV. 457 (1998) (“Before the enactment of the Indian Civil Rights Act, it was generally recognized that the United States Constitution did not regulate an Indian tribe’s treatment of its members or non-members.”).

<sup>46</sup> Jones, *supra* note 45, at 474.

<sup>47</sup> Clarkson, *supra* note 34, at 481.

## B. Judicial Citations

Judicial citation<sup>48</sup> has received a healthy dose of scholarly attention,<sup>49</sup> but is generally not regarded as a top field of study.<sup>50</sup> The corpus of writing that does exist is at war with itself over the functions and effects of citation. A survey of this conflicted body of research suggests three predominant theories of judicial citation. The first considers citations as reflecting the legally prescribed basis for a judge's decision. Under this theory, citations are dictated by *stare decisis* and judges have little to no room for creative adjudicative maneuvers.<sup>51</sup> The second and more cynical theory views citations as "mere masks"<sup>52</sup> for the non-legal determinants behind a decision, such as ideology or politics.<sup>53</sup> The third, middle-of-the-road theory characterizes citations as an essential component of a court's legitimacy insofar as they promote judicial constraint. Judges cannot let their personal ideology or politics alone decide the case; they must at least find *some* basis for their decision in pre-existing law. According to this last view, citations operate as gentle guideposts that keep judges from becoming activists, but they are not straightjackets.<sup>54</sup>

Assessing the accuracy or normative desirability of these three citation theories is beyond the scope of this article. Instead, this article takes the less traveled road of empirical analysis of citation practices. By painting a concrete picture of the current state of judicial citation, empirical research is an important step in understanding the functions and effects of citations. Namely, understanding *how* citations are used can be revealing of *why* they are, or are not, used. So while this article does not directly engage in the theoretical debate, it does contribute to

<sup>48</sup> This reference to judicial citation refers to all judges, not just tribal court judges.

<sup>49</sup> See, e.g., William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 LAW LIBR. J. 267 (2002) ("there have been numerous empirical studies of appellate court citation practices").

<sup>50</sup> See, e.g., Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1932 (2008) ("Legal sophisticates these days worry little about the ins and outs of citation.").

<sup>51</sup> See, e.g., Lawrence M. Friedman ET AL., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 793 (1981) ("According to our legal theory, judges decide 'according to law.' They are not free to decide cases as they please. They are expected to invoke appropriate legal authority for their decisions."); Chad Flanders, *Toward A Theory of Persuasive Authority*, 62 OKLA. L. REV. 55, 60 (2009).

<sup>52</sup> Frank B. Cross et al., *Citations in the U.S. Supreme Court: An Empirical Study of Their Use and Significance*, 2010 U. ILL. L. REV. 489, 493 (2010).

<sup>53</sup> See, e.g., Schauer, *supra* note 50 ("[T]he citation of legal authorities in briefs, arguments, and opinions is scarcely more than a decoration.").

<sup>54</sup> Cross, *supra* note 52.

it. Moreover, statistical documentation of citation practices is lacking.<sup>55</sup> The limited research that does exist focuses primarily on the citation practices of the United States Supreme Court<sup>56</sup> and state appellate courts.<sup>57</sup> And empirical research on tribal court citation is nearly non-existent. The following subsection focuses on the one exception.

### **C. Tribal Court Citations**

An extensive review of tribal law and citation literature only uncovered one study on the citation practices of tribal courts.<sup>58</sup> Barsh reviewed a sample of 359 tribal court opinions published in the Indian Law Reporter<sup>59</sup> between 1992 and 1998. The sample included opinions issued by fifty-six tribal courts at the trial and appellate levels. Particular attention was paid to whether judges based their decisions on “indigenous jurisprudence”<sup>60</sup> as the central aim of the study was to determine the extent to which tribal courts rely on “traditional law,” as opposed to “Western law.”

Barsh hypothesized, and the findings ultimately confirmed, that tribes tend to lean heavily on their own internal law. Of the 359 opinions in the sample, 284 (eighty percent) relied to some extent on tribal authority. The majority of these internal law opinions relied on tribal court precedent (fifty-six percent), while the

<sup>55</sup> See, e.g., *id.* at 491 (“[T]he use and practical effect of citations has received little rigorous analysis, however.”).

<sup>56</sup> See, e.g., Louis J. Sirico, Jr., *The Citing of Law Reviews by the Supreme Court: 1971-1999*, 75 IND. L.J. 1009 (2000); William H. Manz, *Citations in Supreme Court Opinions and Briefs: A Comparative Study*, 94 LAW LIBR. J. 267 (2002); Corey Rayburn Yung, *Supreme Court Opinions and the Justices Who Cite Them: A Response to Cross*, 97 IOWA L. REV. BULL. 41 (2012); John Hasko, *Making Law with Nonlegal Materials*, 46 ADVOC. 22 (2003).

<sup>57</sup> See, e.g., James N.G. Cauthen, *Horizontal Federalism in the New Judicial Federalism: A Preliminary Look at Citations*, 66 ALB. L. REV. 783 (2003); Tina S. Ching, *The Next Generation of Legal Citations: A Survey of Internet Citations in the Opinions of the Washington Supreme Court and Washington Appellate Courts, 1999-2005*, 9 J. APP. PRAC. & PROCESS 387 (2007); Paul Hellyer, *Assessing the Influence of Computer-Assisted Legal Research: A Study of California Supreme Court Opinions*, 97 LAW LIBR. J. 285 (2005).

<sup>58</sup> Russel Lawrence Barsh, *Putting the Tribe in Tribal Courts: Possible? Desirable?*, KAN. J.L. & PUB. POL’Y, (1999) at 74 [hereinafter Barsh]. While an earlier article (Nell Jessup Newton, *Tribal Court Praxis: One Year in the Life of Twenty Indian Tribal Courts*, 22 AM. INDIAN L. REV. 285 (1997)) focuses on tribal court citation practices, its findings do not have an empirical basis; See also, Bonnie Shucha, *‘Whatever Tribal Precedent There May Be’: The (UN)availability of Tribal Law*, 106 LAW. LIBR. J. 199, (2014) (also discusses tribal court citations, but does not have a statistical grounding).

<sup>59</sup> The Indian Law Reporter is a print collection of tribal court opinions available for purchase; See INDIAN LAW REPORTER, <http://www.indianlawreporter.org/> (last visited Nov. 18, 2014).

<sup>60</sup> Barsh, *supra* note 58, at 77.



rest referred to tribal legislation. Barsh also found that reliance on internal rulings or laws was most prevalent in cases focused on “internal social, cultural or political relationships.”<sup>61</sup>

In contrast, tribes in the sample tended to look to United States courts for guidance on matters of a “jurisdictional or procedural nature.”<sup>62</sup> Federal law was a more popular citation source (forty-six percent of cases contained at least one reference) than state law (only twenty-eight percent). Overall, twenty-six percent of cases relied solely on United States law, not citing any tribal authority. Half of these cases were procedural or jurisdictional.

Citation to other tribes’ cases or laws was relatively rare. Ten percent of the cases in the sample (36 out of 359) included an intertribal citation. In contrast, tribes cited their own jurisprudence or legislation in seventy-nine percent of cases. Despite the stark difference between inter- and intra-tribal citation rates, the study did not develop its intertribal citation finding. Instead, it focused on a perceived need for tribal courts to rely more heavily on traditional law, whether inter- or intra-tribal.<sup>63</sup>

Barsh claims that tribes shy away from relying more strongly on traditional law because of a desire to appear legitimate in front of non-tribal audiences. The study calls for a reeducation of tribal judges to better acquaint them with traditional legal reasoning and for judges to in turn educate their communities about these practices.<sup>64</sup> While such an initiative may be of value to tribes, the study does not provide strong grounding for its underlying assertion that the lack of citation to tribal law is motivated by tribal judges’ “fear of non-Indian professionals’ opinions.”<sup>65</sup> Moreover, Barsh does not entertain other explanations, such as a lack of access to opinions or inferior quality of previous rulings.

This article uses Barsh’s work as a springboard to contribute to a field that has received close to no attention. First, this article provides a needed update by analyzing contemporary tribal court opinions (issued in 2013); Barsh reviewed

<sup>61</sup> See Barsh, *supra* note 58, at 79.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 93.

<sup>64</sup> *Id.* at 89 (“To indigenize their own thinking, tribal judges must be prepared to re-learn legal reasoning from a local indigenous perspective; they must risk some of the status they have earned in the non-Indian legal profession; and they must embark on the long-term challenge of educating litigants and their community as a whole.”).

<sup>65</sup> *Id.* at 89.

opinions issued between 1992 and 1998 and tribal courts have changed in the past fifteen years. Indeed, some were not yet in existence when Barsh undertook his study.<sup>66</sup> Notably, this article will also provide a more nuanced discussion of intertribal citation. It will analyze instances of intertribal citation according to cited tribe, the nature of the citation, and the type of dispute at bar. As such, it will contribute to ongoing debates about the existence of an intertribal “common law.”<sup>67</sup>

In addition, in an era of increasing reliance on the internet this article’s utilization of an internet-based tribal court opinion database, as opposed to Barsh’s use of a print compilation, might be more reflective of current or future tribal practices. Even if tribal courts do not currently rely heavily on internet-based sources of tribal law, they will likely do so more in the future. This article’s review of the currently available online tribal court opinion data sources reveals serious gaps, particularly in the number of tribes whose opinions are available online. This deficiency may hinder tribes from building coherent inter- or intra-tribal bodies of law. By bringing attention to this problem, this article hopes to contribute to a growing movement for improved availability.<sup>68</sup>

## II. METHODOLOGY

### A. Data Source

This article’s analysis of tribal court citation practices is based on a three-year sample (May 18, 2010 to May 18, 2013)<sup>69</sup> of tribal court opinions. The sample was extracted from WestlawNext’s online fee-based Native American law database.<sup>70</sup> While WestlawNext has opinions issued as far back as 1997 for some tribes,<sup>71</sup> the time-intensiveness of manual review and this study’s limited research resources made a more expanded timeframe infeasible. The most recent three-years were selected so that findings would speak most directly to current

<sup>66</sup> See, e.g., Greg Skinner, *Council Establishes Tribal Court*, JUNEAU EMPIRE (Sept. 5, 2007), [http://juneauempire.com/stories/090507/loc\\_20070905026.shtml](http://juneauempire.com/stories/090507/loc_20070905026.shtml).

<sup>67</sup> See, e.g., Valencia-Weber, *supra* note 7, at 226 (“The focus of this paper is the development of American Indian law derived from custom, especially common law, among the indigenous nations.”).

<sup>68</sup> See *infra* note 87 (discussing a partnership the Native American Rights Fund and Westlaw have developed to increase the availability of tribal court opinions).

<sup>69</sup> These dates refer to the date each opinion was issued.

<sup>70</sup> While WestlawNext’s Native American law database also includes Federal Indian law case opinions issued by U.S. courts, this article’s review was limited to opinions issued by tribal courts.

<sup>71</sup> See *infra* Table 1 (WestlawNext coverage dates for each reporting tribe).



practices. Opinions from all court levels were included. This ranged from trial, intermediate appellate, to supreme courts. It also included one court whose jurisdiction is limited to gaming disputes.<sup>72</sup>

Print compilations of tribal court opinions, such as the Indian Law Reporter<sup>73</sup> (utilized by Barsh), were ruled out as sources. Online databases present numerous advantages, including advanced search (by terms, dates, or courts), cataloguing, and opinion extraction tools. Some also include linking functionalities that open cited cases at the click of a mouse on the citing opinion. WestlawNext's tools are particularly advanced and were one of the principal bases for its selection as this article's data source.

WestlawNext was also attractive because of its relative comprehensiveness. While it contains opinions for twenty-three tribes,<sup>74</sup> LexisNexis only has opinions for five.<sup>75</sup> WestlawNext also narrowly beat out several lesser-known competitors. For instance, Versuslaw, an online fee-based opinion database, contains opinions for one less tribe than WestlawNext (twenty-two compared to twenty-three).<sup>76</sup> Similarly, the Tribal Court Clearinghouse,<sup>77</sup> while accessible for free online, also only contains opinions for twenty-two tribes. While these latter two sources' tribal court counts do not differ greatly from WestlawNext's, their online functionalities pale in comparison.

<sup>72</sup> Mohegan Gaming Disputes Court, THE MOHEGAN TRIBE, [http://www.mohegan.nsn.us/Government/gc\\_main.aspx](http://www.mohegan.nsn.us/Government/gc_main.aspx) (last visited Nov. 18, 2014).

<sup>73</sup> The Indian Law Reporter has also been criticized as a source of tribal court jurisprudence on non-technological grounds. See, e.g., Jones, *supra* note 45, at 514 n.78 ("Although there is an Indian Law Reporter which compiles tribal court decisions, as well as federal and state law decisions involving Indian law issues, the decisions contained therein are voluntarily submitted by tribal courts and there is no regulated method of gathering tribal court decisions.").

<sup>74</sup> Two of these twenty-three are actually tribal court reporters, one is an intertribal court, and a few are courts for confederated tribes. Each of these nominal "tribes" includes opinions for more than one tribe. (Information about the actual number was not available.) As a result, WestlawNext likely contains opinions for more than twenty-three tribes. For ease of expression, these reporters, multi-tribal courts, and confederacies are grouped with other WestlawNext tribal opinion sources, and are included in references to "twenty-three tribes" throughout this article. Such oversimplification is not unprecedented. See, e.g., *American Tribal Law Reporter Now on Westlaw*, Paul L. Boley Law Library, LEWIS & CLARK LAW SCHOOL, <http://lawlib.lclark.edu/spotlights/TribalLawReporter> (last visited Nov. 18, 2014) ("The Tribal Law Reporter provides tribal, appeals and supreme court opinions from 21 American tribal courts...").

<sup>75</sup> The tribe count was obtained in an interview with a Lexis representative on May 26, 2013.

<sup>76</sup> Versuslaw.com, <http://www.versuslaw.com/help/library/LibCatProfessional.aspx#tribal> (last visited Nov. 18, 2014).

<sup>77</sup> Tribal Court Clearinghouse, <http://www.tribal-institute.org/lists/decision.htm> (last visited Nov. 18, 2014).

Some tribes make their opinions available on their own websites.<sup>78</sup> In addition, some tribes participate in joint court systems, sharing judges and prosecutors. Some of these multi-tribe systems make their members' opinions available on a single website, such as the Northwest Intertribal Court System's website.<sup>79</sup> However, compiling opinions from separate websites would introduce the risk of manual error (e.g., failing to include opinions within the sample timeframe or miscategorizing opinions). In addition, constructing a multi-tribe sample within a single timeframe would be challenging, as these separate sources contain opinions issued over different spans of time. In contrast, WestlawNext does not require manual compilation or categorization, and the website contains a search functionality that selects cases issued within specified timeframes.

While WestlawNext is the most analytically advanced and comprehensive source available, it is not without limitations. Crucially, its supply of tribal court opinions is severely limited relative to the number of tribes with tribal courts. Currently, there are 566 federally recognized tribes,<sup>80</sup> and according to one estimate, 400 unrecognized tribes.<sup>81</sup> Roughly half of recognized tribes (283) have tribal courts.<sup>82</sup> WestlawNext's database only contains opinions for approximately one-tenth<sup>83</sup> of these tribes.

As of four years ago, tribes had added incentive to report their opinions to WestlawNext. In 2009, the Native American Rights Fund (NARF) formed a "strategic alliance" with West whereby they work together to increase access to

<sup>78</sup> See, e.g., Navajo Nation Supreme Court decisions, <http://www.navajocourts.org/suctopinions.htm> (last visited Nov. 18, 2014); Cherokee Nation Supreme Court, <http://www.cherokeecourts.org/SupremeCourt/SupremeCourtCaseOpinionsandInformation.aspx> (last visited Nov. 18, 2014).

<sup>79</sup> Northwest Intertribal Court System, <http://www.nics.ws/opinions/opinions.htm> (last visited Nov. 18, 2014).

<sup>80</sup> Bureau of Indian Affairs Notice, 78 Fed. Reg. 26384 (May 6, 2013).

<sup>81</sup> GAO, Federal Funding for Non-Federally Recognized Tribes. GAO-12-348. Apr. 2012.

<sup>82</sup> David Selden, *Basic Indian Law Research Tips—Tribal Law*, National Indian Law Library at the Native American Rights Fund, [http://www.narf.org/nill/resources/tribal\\_law\\_research\\_2012.pdf](http://www.narf.org/nill/resources/tribal_law_research_2012.pdf) (last visited Nov. 18, 2014).

<sup>83</sup> This percent may actually be a bit higher. As previously mentioned, the twenty-three "tribes" in WestlawNext include an intertribal reporter and court, as well as confederated tribes. Each of these was only counted once, since accurate figures were not available. This percent should be read as an estimate.

**TABLE 1. Summary of Tribal Opinions on WestlawNext (May 2013)**

	Native American Indian Tribe/Court With Opinions Available on Westlaw	Number Opinions on Westlaw	First Year Westlaw Coverage	Date Most Recent Opinion on Westlaw	Principal Locations	Federally Recognized
1	Cherokee Nation of Oklahoma	120	1997	June, 2012	OK	Yes
2	Cheyenne River Sioux	22	2001	October, 2007	SD	Yes

<sup>88</sup> For instance, there were only nine opinions on WestlawNext for the Fort McDowell Yavapai Nation, the most recent of which is seven years old. See Table 1 for the number and recency of opinions on WestlawNext by tribe.

<b>3</b>	Confederated Salish & Kootenai Tribes	35	1997	May, 2007	MT	Yes
<b>4</b>	Confederated Tribes Colville Reservation	126	1997	December, 2012	WA	Yes
<b>5</b>	Confederated Tribes Grand Ronde Community	103	1999	December, 2005	OR	Yes
<b>6</b>	Eastern Band of Cherokee Indians	117	2000	August, 2010	NC	Yes
<b>7</b>	Fort McDowell Yavapai Nation	9	2001	July, 2006	AZ	Yes
<b>8</b>	Fort Peck Tribes	149	1997	January, 2008	MT	Yes
<b>9</b>	Grand Traverse Band	96	1997	June, 2009	MI	Yes
<b>10</b>	Ho-Chunk Nation	157	1997	July, 2011	WI	Yes
<b>11</b>	Hopi	115	1997	June, 2012	AZ	Yes
<b>12</b>	Inter-Tribal Court of Appeals of Nevada	185	1997	December, 2006	NV	Membership Varies
<b>13</b>	Leech Lake Band of Ojibwe	26	2002	February, 2010	MN	Yes
<b>14</b>	Little River Band of Ottawa Indians	93	1998	May, 2009	MI	Yes
<b>15</b>	Little Traverse Bay Bands of	46	1998	June, 2009	MI	Yes

	Odawa Indians					
<b>16</b>	Mille Lacs Band of Chippewa Indians	10	1998	November, 2008	MN	Yes
<b>17</b>	Mohegan	203	1997	April, 2013	CT	Yes
<b>18</b>	Navajo Nation	246	1997	February, 2013	AZ, NM, UT	Yes
<b>19</b>	Oklahoma Tribal Courts	1,017	1979	February, 2007	OK	Membership Varies
<b>20</b>	Oneida Tribe of Indians of Wisconsin	755	1997	September, 2011	WI	Yes
<b>21</b>	Sac & Fox Nation	18	1998	March, 2007	OK	Yes
<b>22</b>	Tulalip Tribes	72	1997	April, 2013	WA	Yes
<b>23</b>	West's Mashantucket Pequot	556	1992	May, 2013	CT	Yes
<b>T O T A L</b>	<b>Total Number Tribal Opinions on Westlaw</b>	<b>4,276</b>				

Despite being the optimal choice, using WestlawNext data may have resulted in a biased sample. Tribes that share their opinions with WestlawNext have the resources for publication and distribution.<sup>89</sup> As a result, wealthier tribes are likely overrepresented. Moreover, tribes that report their opinions do so

<sup>89</sup> The author contacted WestlawNext for more information about its tribal law solicitation and publication processes and policies. However, WestlawNext has a policy of not publicly discussing its methods of obtaining legal materials.

voluntarily. This willingness may be associated with practices that are more consistent with United States courts' and less vulnerable to external criticism. Thus the sample might contain a disproportionate number of United States-style courts. Moreover, WestlawNext does not necessarily contain all opinions issued by reporting courts. Since reporting is at the courts' discretion, tribes may only report a portion of their caseload.<sup>90</sup> And tribes' bases for selection may bring in other dimensions of bias.

In addition, several tribes may be overrepresented in WestlawNext. Nearly one-quarter (1,017 out of 4,276)<sup>91</sup> of all opinions in WestlawNext's tribal database are from a single reporter, namely, the Oklahoma Tribal Courts Reports. While precise information about which courts' opinions are in this reporter was not available, it is unlikely that the number of opinions actually issued by these courts accounts for one-quarter of all opinions issued by tribal courts.<sup>92</sup> The Oneida Tribe of Wisconsin reported the second greatest number of opinions, accounting for nearly one-fifth (755 out of 4,276) of the tribal opinions in WestlawNext. To put this in context, the Oneida Tribal Courts had jurisdiction over 16,567 members in 2010,<sup>93</sup> whereas Navajo courts adjudicated on behalf of roughly 332,129 people that year.<sup>94, 95</sup> Only six percent, compared to Oneida's eighteen percent, of WestlawNext's tribal opinions were issued by the Navajo Nation.

<sup>90</sup> Barsh, *supra* note 58, at 80 ("It must be borne carefully in mind that the sample consists of published decisions, rather than total caseload. It could be argued that unpublished decisions involve more "traditional," or at least more informal, approaches to dispute settlement.").

<sup>91</sup> These figures may contain a limited number of double counted opinions. While several duplicate opinions were identified and removed from the article's three-year sample (see this paper's Methodology section for more detail about this process), conducting the same data cleaning procedure for WestlawNext's entire tribal court opinion database was beyond this study's scope.

<sup>92</sup> The study author was unable to obtain reliable information about the precise number of tribes and/or tribal courts covered by the Oklahoma Tribal Courts Reports. A rough estimate suggests that approximately twenty tribal courts are included. See Oklahoma Legal Services Inc., *Seeking Native Justice*, <http://thorpe.ou.edu/OILS/court.html> (last visited Nov. 18, 2014). While these reports also contain opinions issued by Courts of Indian Offenses (administered by the U.S. government), the study's three-year sample did not contain any and WestlawNext's overall tribal court database did not appear to either.

<sup>93</sup> Oneida Nation of Wisconsin, *Tribal Statistics*, <http://witribes.wi.gov/docview.asp?docid=5637&locid=57> (last visited Nov. 18, 2014).

<sup>94</sup> United States Census Bureau, *The American Indian and Alaska Native Population: 2010*. In discussing tribal population size, this article alternates between Census data, based on "tribal groupings," and membership counts publicized by tribes themselves. While these figures are not strictly comparable, population size data was not available for all tribes based on a single metric.

<sup>95</sup> Admittedly, tribe size is not necessarily proportionate to tribal court caseload. (For instance, some tribes might be more litigious than others, some might resort frequently to extra-judicial

WestlawNext also suffers from underrepresentation. The largest tribal affiliation according to the most recent United States Census is the Cherokee Nation, and their opinions only account for a fraction of WestlawNext's inventory.<sup>96</sup> The two Cherokee Nation courts in WestlawNext (the Cherokee Nation of Oklahoma and the Eastern Band of Cherokee Indians) together only account for five percent of the total opinions. Several other tribes ranked as among the largest were completely missing from WestlawNext. For instance, the Choctaw is the third most numerous tribe<sup>97</sup> but did not have any opinions.<sup>98</sup> Several more of the top ten most numerous tribes, including the Chippewa, Sioux, Apache, Blackfeet, and Creek also were not represented in WestlawNext's database.<sup>99</sup>

### **B. Study Sample**

The three-year sample extracted from WestlawNext totaled 231 opinions. An opinion title and number comparison revealed that twenty-three were included in duplicate.<sup>100</sup> These duplicates were dropped. This resulted in the removal of one-tenth of the initial sample, leaving a final sample of 208 opinions. These opinions were issued by seventeen tribal courts. See Table 2 on the next page for a summary of the final sample.

Two tribal courts together accounted for almost half of the sample. The Navajo Supreme Court had the most, accounting for nearly one quarter. The two Mashantucket Pequot courts (trial plus appellate) were a close second, with twenty-one percent of the sample's opinions. Barsh's sample was also dominated by these two tribes' courts. Barsh noted that the numerosity of Navajo opinions makes sense, in light of that tribe's size.<sup>101</sup> However, Barsh viewed the high

mediation, and some might lean heavily on U.S. courts.) This study uses tribe size as a rough estimate of expected opinion issuance figures, since tribal court caseload data is not available.

<sup>96</sup> Census, *supra* note 94 ("The Cherokee tribal grouping had the largest alone-or-in-any-combination population, with 819,000.").

<sup>97</sup> *Id.*

<sup>98</sup> However, Choctaw rulings were the subject of two of the intertribal citations identified within the study's three-year WestlawNext sample. See Table 6 for more information.

<sup>99</sup> Census, *supra* note 94. It should be noted that while some of these tribes are included in the Oklahoma Tribal Courts Reports, none of their opinions were in WestlawNext.

<sup>100</sup> Discussions with WestlawNext representatives (on May 23, 2013) revealed that WestlawNext was not aware that it was publishing some tribal opinions more than once. The study author's inquiry initiated an investigation that revealed a pattern of double postings within WestlawNext's tribal court database. WestlawNext was of the opinion that the double postings were not the result of duplicate submissions by tribes. Rather, the duplication was due to WestlawNext error.

WestlawNext subsequently notified the study author that the errors had been corrected.

<sup>101</sup> Barsh, *supra* note 58, at 77-78 ("It should not be surprising that Navajo is heavily represented

number of Pequot opinions as misrepresentative because many were casino-related, and excluded Pequot opinions for this reason.<sup>102</sup> Presumably, this decision was motivated by the study's focus on traditional law and an assumption that gaming is beyond this scope. This article aims to shed light on citation practices more generally, and thus did not follow Barsh in disregarding Pequot opinions.<sup>103</sup>

**TABLE 2. 3-Year Sample Tribal Opinions (May 18, 2010- 2013)**

	<b>Tribal Court Name</b>	<b>Number of Opinions</b>	<b>Level in Tribal Court System</b>
<b>1</b>	<b>Appellate Court of the Hopi Tribe</b>	13	Appellate Court
<b>2</b>	<b>Cherokee Court Eastern Band of Cherokee Indians</b>	1	Trial Court
<b>3</b>	<b>Cherokee Nation Supreme Court</b>	9	Supreme Court
<b>4</b>	<b>Colville Tribal Court of Appeals</b>	18	Appellate Court
<b>5</b>	<b>Coquille Indian Tribal Court</b>	1	Trial and Appellate Court
<b>6</b>	<b>Ho-Chunk Nation Supreme Court</b>	2	Supreme Court
<b>7</b>	<b>Ho-Chunk Nation Trial Court</b>	18	Trial Court
<b>8</b>	<b>Mashantucket Pequot Court of Appeals</b>	6	Appellate Court

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since it has the largest population and caseload.”).

<sup>102</sup> *Id.* at 78 (“The Pequot court is clearly overrepresented in relation to the size of that tribe, however—an artifact of the high volume of disputes involving the Pequots’ casino, which accounted for 12 percent of all the reported cases. For this reason, the Pequot decisions have been deleted from some of the analyses presented below.”).

<sup>103</sup> Barsh reported two sets of findings, each based on a different sample. One sample included and the other excluded Pequot opinions. Since this study included Pequot opinions, the Barsh findings it discusses are based on the Pequot-inclusive sample.



<b>9</b>	<b>Mashantucket Pequot Tribal Court</b>	37	Trial Court
<b>10</b>	<b>Mohegan Gaming Disputes Court of Appeals</b>	2	Appellate Court
<b>11</b>	<b>Mohegan Gaming Disputes Trial Court</b>	16	Trial Court
<b>12</b>	<b>Mohegan Tribal Trial Court</b>	5	Trial Court
<b>13</b>	<b>Oneida Tribal Judicial System Trial Court</b>	17	Trial Court
<b>14</b>	<b>Shoshone and Arapaho Tribal Court</b>	1	Trial and Appellate Court
<b>15</b>	<b>Supreme Court Eastern Band Cherokee Indians</b>	2	Supreme Court
<b>16</b>	<b>Supreme Court Navajo Nation</b>	46	Supreme Court
<b>17</b>	<b>Tulalip Tribal Court of Appeals</b>	14	Appellate Court
<b>TOTAL</b>	<b>Total Number of Opinions in Sample</b>	208	

In contrast, several courts in the sample only had one or two opinions. For instance, the Coquille Tribe and Shoshone-Arapaho Tribes' joint court each only had one opinion. As one might expect based on this small turnout, all three of these tribes are small. Coquille's membership is estimated at 695 people,<sup>104</sup> in stark contrast to the Navajo Nation's 332,129.<sup>105</sup> The Shoshone and Arapaho

<sup>104</sup> Coquille Tribe, NORTHWEST PORTLAND AREA INDIAN HEALTH BOARD, [http://www.npaihb.org/member\\_tribes/tribe/coquille\\_tribe/](http://www.npaihb.org/member_tribes/tribe/coquille_tribe/) (last visited Nov. 18, 2014).

<sup>105</sup> Census, *supra* note 94.

Tribes are larger than Coquille, at 7,400 and 4,200 respectively,<sup>106</sup> but still small compared to some of the other tribes in the sample. As such, these three tribes' limited representation in the sample may actually be proportionate to their real-world judicial presence. However, the small number of opinions limited the inferences that could be made. Clearly, one opinion (or even quite a few more) for a single tribe or court is not revealing of an overall citation "practice."

The courts with opinions in the sample were well-balanced numerically in terms of court level. Of the sample's issuing courts, six were at the trial level, five were appellate (excluding supreme courts), and four were supreme. (Two of the courts, not included in the foregoing, operate on both the trial and appellate levels.) However, this numerical balance is surprising since not all tribes have appellate courts and not all cases are appealed. Thus, one would expect a greater proportion of trial-level courts, as well as opinions. Forty-five percent of the sample's opinions were issued by trial courts, whereas reason suggests that trial opinions should account for the vast majority.

One possible explanation is that appellate courts are more able or eager to report their opinions, perhaps because of greater access to resources or more confidence and willingness to expose their adjudication. Alternatively, cases that reach appellate levels may be high-profile or particularly far-reaching, and tribal communities may demand decisional details. Regardless, this study's findings might be more reflective of appellate than overall citation practices, which likely have a wider basis in trial court adjudication.

### ***C. Data Analysis***

Each of the 208 opinions in the sample was reviewed using a standardized review instrument. The instrument was developed based on the results of a review of a sub-sample (totaling thirteen opinions), consisting of the tribal court opinions issued within the last six months available on WestlawNext. This preliminary review suggested ten citation categories to guide citation tracking: (1) cite to same court (self-referential); (2) cite to lower court (same tribe); (3) cite to higher court (same tribe; excluding tribal supreme court opinions); (4) cite to supreme court (same tribe); (5) cite to other tribal court; (6) cite to state court in tribe's primary

<sup>106</sup> Frequently Asked Questions, THE ARAPAHO PROJECT, <http://www.colorado.edu/csllw/arapahoproject/contemporary/faq.htm> (last visited Nov. 18, 2014).

state; (7) cite to other state court; (8) cite to Circuit court; (9) cite to United States Supreme Court; and (10) cite to foreign court.

While the preliminary sub-sample review also revealed citations to legal materials other than opinions (for instance, Black's Law Dictionary<sup>107</sup> made several appearances) as well as a variety of non-legal sources (ranging from Goethe<sup>108</sup> to Forrest Gump<sup>109</sup>), only citations to court opinions were routinely tracked.

For each opinion, citations were identified and logged according to the ten categorizes. These findings were recorded in a master database. This analysis did not account for the nature of the citation. For instance, negative treatment was not differentiated from positive. Such nuanced assessment was prohibitively time-intensive, and raw citation counts are quite meaningful in their own right. Even if a case is cited as not dispositive, such reference still functions as an acknowledgement that the cited court's rulings are potentially relevant. Moreover, references to other courts' opinions are revealing of courts' access to external law, regardless of the level of deference shown.

Citations in opinion footnotes, in addition to those in the body of the opinion, were recorded. The analysis did not differentiate citations based on their location. In addition, when a citation itself explicitly referred to another opinion,<sup>110</sup> each cited opinion was recorded separately. However, cited opinions were only counted once per citing case, not each time they appeared if they were referenced multiple times. While analyzing the number of times individual cases are cited in a given opinion might speak to the weight given to the cited material, assessing depth of treatment was beyond this study's scope. Finally, cited opinions were not

<sup>107</sup> See, e.g., *K.F. v. Quil Ceda Village Liquor Store*, 2013 WL 1812229 (Tulalip C.A.), 5 ("Black's Law Dictionary, Centennial Edition (1991), defines "pro se" as "For one's own behalf.").

<sup>108</sup> *Walton v. Mashantucket Pequot Gaming Enter.*, MPTC CV-AA-2011-174, 2012 WL 4513385 (Mash. Pequot Tribal Ct. Oct. 1, 2012) ("Thus, unlike Goethe's Dr. Faust...who made [his] own deals with the devil and got at least temporary benefits, here the plaintiff received very little (only a few sips of beer) in return.").

<sup>109</sup> *EXC, Inc. v. Kayenta Dist. Court*, SC-CV-07-10, 2010 WL 3701050 (Sept. 15, 2010) ("The buttes are featured in ...recent movies such as *Forrest Gump*...").

<sup>110</sup> E.g., *Sandoval v. Navajo Election Admin.*, SC-CV-62-12, 2013 WL 775403 (Feb. 26, 2013); *In re Appeal of Vern R. Lee*, 6 Am. Tribal Law 788, 789–90 (Nav.Sup.Ct.2006) (citing *Begay v. Navajo Nation Election Admin. (NEA)*, 8 Nav. R. 241, 250, 4 Am. Tribal Law 604 (Nav.Sup.Ct.2002)).

examined to determine if the cited text itself contained another citation. While this was likely the case in a few instances, this study was only concerned with tribal courts' explicit reliance on other opinions.

### III. FINDINGS

#### A. Results Overview

According to a detailed review of the three-year sample, tribal courts look predominantly to tribal law in their citations. Seventy percent of all citations to other opinions (1,197 out of a total 1,706 citations in the sample) were to tribal court decisions. In comparison, tribal courts only turned to United States court jurisprudence for thirty percent of their citations (508 out of the total 1,706 citations). Strikingly, tribal courts barely acknowledged foreign courts' existence, with a mere one citation in the entire sample. See Table 3 below for a summary of these findings.

**TABLE 3. Summary of Citation Findings**

<b><u>Total</u> Number of Citations in Sample</b>	<b>Average Number of Citations per Opinion</b>	<b>Number of Citations to <u>Tribal</u> <u>Courts</u></b>	<b>Average Number of Citations to Tribal Courts per Opinion</b>	<b>Number of Citations to <u>United</u> <u>States</u> <u>Courts</u></b>	<b>Average Number of Citations to United States Courts</b>	<b>Number of Citations to <u>Foreign</u> <u>Courts</u></b>
1,706	8	1,197	6	508	2	1

On average, opinions in the sample cited eight cases. This rate does not differ greatly from rates reported for some United States courts. For instance, one study found that the United States Supreme Court cites an average of seven Court

decisions in each opinion, and cites elsewhere infrequently.<sup>111</sup> State supreme courts, however, appear to cite more heavily. According to one study, state supreme court opinions include an average of fourteen citations.<sup>112</sup> Similarly, a study of the New York Court of Appeals (the state's highest court) found an average of eleven citations per opinion.<sup>113</sup> Relative to these United States courts, tribal courts appear to be on the lower end of the citation spectrum.

However, there are many United States courts that may be more comparable to tribal courts for which citations rates were not available. These similarities, such as lack of legal resources, judges' with limited training, and geographic remoteness, could affect citation rates. And if rates for these United States courts are indeed low, the overall rate for United States courts may actually be closer to tribal courts' than the studies suggest.

### ***B. Citations to Tribal Courts***

The vast majority of citations to tribal precedent was self-referential.<sup>114</sup> Just over eighty percent of all citations to tribal opinions (967 out of a total of 1,197 citations to tribal courts) were to opinions previously issued by the citing court itself. In some instances this insularity is likely largely due to the fact that some tribal court systems only consist of one court, which functions on both the trial and appellate levels. Two tribal courts included in the sample, the Coquille Indian Tribal Court and the Shoshone and Arapaho Tribal Court, each play this dual role. These courts cannot cite tribal court opinions other than their own without looking outside their own tribes.

These two courts each only accounted for one opinion out of the sample's 208. So the fact that some tribal court systems are single-tiered likely does not fully account for the finding that tribal courts cite their own decisions so much more frequently than they cite other courts in their tribe's judicial system. Alternatively, tribal courts' insularity could be an indication that even access to opinions issued

<sup>111</sup> Cross, *supra* note 52, at 530.

<sup>112</sup> Lawrence M. Friedman ET AL., *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 795 (1981).

<sup>113</sup> *New York Appellate Decisions Show Preference for Recent Cases, Commentaries and Bill Memos*, N.Y. St. B.J., May 2002, at 8.

<sup>114</sup> A "self-referential" citation is when the citing tribal court refers to one of its own opinions.

within the same tribal court system, but at different levels, is limited. See Table 4 below for a summary of the findings on citations to tribal courts.<sup>115</sup>

**TABLE 4. Citations to Tribal Courts: Findings Summary**

<b>Total Number of Citations to <u>Tribal Courts</u></b>	<b>Number of <u>Self-Referential</u> Citations</b>	<b>Number of Citations to <u>Lower Courts</u> (Same Tribe)</b>	<b>Number of Citations to <u>Higher Courts</u> (Same Tribe)</b>	<b>Number of Citations to <u>Tribal Supreme Court</u> (Same Tribe)</b>	<b>Number of Citations to <u>Other Tribes</u><sup>116</sup></b>
1,197	967	55	103	62	10

While the foregoing suggests that tribal courts are strongly focused on their own jurisprudence, they are not blind to the other courts that adjudicate on behalf of their tribes. Almost one-tenth of citations to tribal courts (103 of the 1,197 total) were to higher courts within the same tribal court system. Courts looked to their tribe's supreme court to a lesser extent, only citing supreme courts in five percent of their citations to tribal courts. However, this finding should be read in light of the fact that a number of tribes do not have supreme courts. Thus this low citation rate may largely be the result of necessity and not choice. Citation to lower courts within the same tribe was only slightly less frequent than citation to supreme courts, accounting for just under five percent.

In contrast, the number of citations to other tribes' courts was strikingly small. A mere one percent of citations to tribal courts (10 out of 1,197) were intertribal. These ten intertribal citations appeared in six opinions. (See Table 5 on the following page for a detailed description of each of the ten instances of

<sup>115</sup> The categories in Table 4 are mutually exclusive. For instance, even though a citation to a tribal supreme court may technically be a citation to a higher court, citations to mere appellate courts were disaggregated from courts identified as "supreme." Similarly, if a tribal supreme court cited itself, this citation only counted towards the "self-referential" citation tally.

<sup>116</sup> As noted in this article's Introduction, the practice of citing to other tribes is generally referred to as "intertribal citation" throughout this article.

intertribal citation.) This low rate of intertribal citation may be the result of a lack of access to other tribal courts' decisions.<sup>117</sup> It could also be due to inter-tribal animosity, or a general distaste for citing "external" tribal jurisprudence because of perceived differences in tribal custom.

Barsh's findings on intertribal citation are not directly comparable to this article's, but not for the reason discussed previously (i.e., a difference in the unit of analysis, namely, percentage of opinions versus citations). The Barsh study included citations of tribal legislation within its intertribal citation category, and this study only recorded citations to other tribes' decisions. Barsh found that ten percent of opinions included at least one citation to another tribe's law or legal decision. In contrast, this study found that only three percent of opinions (6 out of 208) included at least one intertribal citation. That Barsh found a greater prevalence of intertribal citation than this study is not unexpected since Barsh's definition of intertribal citation was broader.

**TABLE 5. Citations to Tribal Courts: Detailed Findings**

	Citing Opinion Title	Citing Opinion Date	Citing Opinion Type Case of	Citing Tribal Court	Tribal Court Cited	Description Of Intertribal Citation	Availability of Cited Opinion
1	Bradley v. Tulalip Tribes, 10 Am. Tribal Law 283	May, 2012	Tort Law	Tulalip Tribal Court of Appeals (WA)	Hoopa Valley Tribal Court of Appeals (CA)	Other tribe's opinion cited in reference to "the common law of sovereign immunity."	Unable to locate online in publicly accessible tribal court opinion databases. (Not on Westlaw)

<sup>117</sup> Aaron F. Arnold ET AL., *State and Tribal Courts: Bridging the Divide*, CENTER FOR COURT INNOVATION (2011) at 12 ([T]ribal courts often lack the technological capacity to store and retrieve information from court cases, and they do not have reliable access to compilations of tribal court decisions from other jurisdictions.").

						Cited portion of other tribe's opinion is in turn a citation to a Federal Circuit court opinion.	
<b>2</b>	Bradley v. Tulalip Tribes, 10 Am. Tribal Law 283	May, 2012	Tort Law	Tulalip Tribal Court of Appeals (WA)	Hoop Valley Tribal Court of Appeals (CA)	Other tribe's opinion cited in reference to "the common law of sovereign immunity."	Publicly available online at Northwest Intertribal Court System website <sup>118</sup> (as noted by the citing opinion). (Not on Westlaw)
<b>3</b>	Bradley v. Tulalip Tribes, 10 Am. Tribal Law 283	May, 2012	Tort Law	Tulalip Tribal Court of Appeals (WA)	Puyallup Tribal Court (WA)	Other tribe's opinion cited in reference to "the common law of sovereign immunity."	Publicly available online at Versuslaw.com <sup>119</sup> (Not on Westlaw)
<b>4</b>	Zavala v. Milstead, 10 Am. Tribal	Sept., 2011	Family Law (child custody)	Colville Tribal Court of Appeals	Navajo Nation Supreme Court	Citing court cites other tribe's opinion in	Publicly available online at Navajo Supreme Court website <sup>120</sup>

<sup>118</sup> Northwest Intertribal Court System, <http://www.nics.ws/opinions/opinions.htm> (last visited Nov. 18, 2014).

<sup>119</sup> VersusLaw, <http://www.versuslaw.com/> (last visited Nov. 18, 2014).

<sup>120</sup> Navajo Supreme Court, <http://www.navajocourts.org/suctopinions.htm> (last visited Nov. 18, 2014).



	Law 195			(WA)	(AZ)	reference to the fact that it is the only case mentioned by appellant. Citing court notes that they do not find Navajo law persuasive.	(Available on Westlaw)
5	C.S. v. Tulalip Tribes Housing Dept., 9 Am. Tribal Law 407	Feb., 2011	Employment Law	Tulalip Tribal Court of Appeals (WA)	Hoopa Valley Tribal Court of Appeals (CA)	Other tribe's opinion cited in reference to courts' duty to proactively establish jurisdiction.	Unable to locate online in publicly accessible tribal court opinion databases. (Not on Westlaw)
6	C.S. v. Tulalip Tribes Housing Dept., 9 Am. Tribal Law 407	Feb., 2011	Employment Law	Tulalip Tribal Court of Appeals (WA)	Squaxin Island Tribal Court of Appeals (WA)	Other tribe's opinion cited in reference to courts' duty to proactively establish jurisdiction.	Unable to locate online in publicly accessible tribal court opinion databases. (Not on Westlaw)
7	Desautel v. Dupris, 10 Am.	Jan., 2011	Tribal Enrollment and Judicial	Colville Tribal Court of	Navajo Nation Supreme	Other tribe's opinion cited in	Publicly available online at Versuslaw.com <sup>121</sup>

<sup>121</sup> VersusLaw, *supra* note 119.

	Tribal Law 188		Misconduct	Appeals (WA)	Court (AZ)	reference to courts' "inherent powers." Citation is indirect; it refers to another of the citing court's own opinions, which contains the other tribe's citation.	(Not on Westlaw)
8	Nissen v. Coquille Economic Dev. Corp., Am. Tribal Law	Dec., 2010	Tort Law	Coquille Indian Tribal Court (OR)	Cherokee Court of the Eastern Band of Cherokee Indians (NC)	Other tribe's opinion cited to support assertion that principles of estoppel do not apply to subject matter jurisdiction. Citation introduced with statement that "at least one tribal court is in accord."	Unable to locate online in publicly accessible tribal court opinion databases. (Available on Westlaw)

9	Billie v. Collins, Am. Tribal Law	Sept., 2010	Family Law (divorce)	Ho-Chunk Nation Trial Court (WI)	Choctaw Tribal Court (OK)	Other tribe's opinion cited in reference to divorce and custody ruling.	Unable to locate online in publicly accessible tribal court opinion databases. (Not on Westlaw)
10	Billie v. Collins, Am. Tribal Law	Sept., 2010	Family Law (divorce)	Ho-Chunk Nation Trial Court (WI)	Choctaw Tribal Court (OK)	Other tribe's opinion cited in reference to modification of divorce and custody ruling.	Unable to locate online in publicly accessible tribal court opinion databases. (Not on Westlaw)

One tribal court, the Tulalip Tribal Court of Appeals of Washington State, was responsible for half of the instances of intertribal citation. This finding is not surprising in light of the fact that the Tulalip Tribal Court of Appeals is administered by the Northwest Intertribal Court System (NICS).<sup>122</sup> NICS is a “consortium of Indian tribes” that provides legal services to its tribal members.<sup>123</sup> The NICS judges who sit on the Tulalip Tribal Court of Appeals bench and write the court’s opinions also adjudicate for other tribes. Some of these judges are members of other tribes.<sup>124</sup>

Moreover, all of the Tulalip Appeals Court’s intertribal citations were to decisions issued by other NICS member tribes—the Hoopa, Puyallup, and Squaxin Island tribes are all members.<sup>125</sup> It is also notable that all of the Tulalip’s

<sup>122</sup> *Tulalip Appellate Justices*, TULALIP TRIBAL COURT, <http://www.tulaliptribes-nsn.gov/Home/Government/Departments/TribalCourt/AppellateJudgeBio.aspx> (last visited Nov. 18, 2014).

<sup>123</sup> *About NICS*, NORTHWESTERN INTERTRIBAL COURT SYSTEM, <http://www.nics.ws/> (last visited Nov. 18, 2014).

<sup>124</sup> *Tulalip Appellate Justices*, *supra* note 122.

<sup>125</sup> *Tribal Court Contacts*, NORTHWESTERN INTERTRIBAL COURT SYSTEM, <http://www.nics.ws/tribes/tribes.htm> (last visited Nov. 18, 2014).

intertribal citations involved positive treatment. The other courts' decisions were referred to as applicable authority, and not for the sake of distinguishing. Moreover, three of these five citations were in reference to the existence and persuasiveness of an intertribal common law. Taken together, these facts suggest that the Tulalip court's propensity for intertribal citation is a function of the intertribal nature of the Tulalip court itself.

Two other tribes were each responsible for two instances of intertribal citation. One of these courts, the Colville Tribal Court of Appeals, cited the Navajo Supreme Court on both occasions. Interestingly, the Colville court's treatment of Navajo jurisprudence was contradictory. In one instance, the Colville court only noted the Navajo case because it was cited in a party's submissions, and explicitly stated that it does not find Navajo law persuasive.<sup>126</sup> (However, the citing court did take the Navajo decision seriously enough to bother distinguishing it.) In the other instance, the Colville court cited a Navajo decision positively, albeit indirectly, to establish a court's duties.<sup>127</sup> The citation supported an assertion that all courts have "inherent powers" of review. It was indirect insofar as the citation referred to an opinion issued by the citing court itself that cited the other tribe (Navajo).

This apparent inconsistent treatment could be the result of the small sample size (a review of a larger number of decisions may actually reveal a more consistent trend) or perhaps no fixed view on the persuasiveness of other tribal courts' decisions. The fact that the negative instance of intertribal citation was in a family law matter (conceivably related to tribe-specific custom) and the positive treatment appeared in an enrollment/judicial misconduct case (more procedural in nature, and perhaps more generalizable across tribes) invites speculation about whether the nature of the case affects a court's willingness to apply other tribes' decisions. However, the significance of such an inference is negated by the small sample size.

The second tribal court that was responsible for two instances of intertribal citation, the Ho-Chunk Nation Trial Court, also cited the same court on both occasions. However, these two citations (to the Choctaw Tribal Court) were more procedural and neutral than the instances of intertribal citation just discussed. Both citations referred to the Choctaw court rulings for factual purposes, to establish the

<sup>126</sup> *Zavala v. Milstead*, AP09-008, 2011 WL 5172905 (Sept. 12, 2011) ("Even if we were persuaded to follow Navajo case law, which we aren't at this time, *Miles* is not apposite to the holdings herein.").

<sup>127</sup> *Desautel v. Dupris*, AP10-012, 2011 WL 7867369 (Jan. 21, 2011).

outcome of previous adjudication.<sup>128</sup> Thus these two instances of intertribal citation did not reveal a strong disposition one way or the other towards other tribal courts' jurisprudence.

The remaining instance of intertribal citation, by the Coquille Indian Tribal Court, was notable for its demonstration of broad receptivity to other tribal courts' jurisprudence. It introduced the other courts' opinion by stating that "[a]t least one tribal court is in accord."<sup>129</sup> This statement could be read to suggest that the Coquille court generally considers other tribal courts' jurisprudence as persuasive, and may not distinguish the degree of authority according to the precise identity of the other court.

### ***C. Citations to United States Courts***

In citing United States courts, tribes frequently turned to state courts. Half of the citations to United States courts were to state courts (247 out of the 508 citations to United States courts). The Barsh study also found what it characterized as a high level of citation to state courts, reporting that nearly thirty percent of opinions in its sample relied to some extent on state law. Barsh found this dependence disturbing in light of tribal courts' need to distinguish themselves from state courts to legitimize their separate existence.<sup>130</sup> To the extent that tribal courts compete with state courts, they are most directly in competition with those in their own states. As a result, tribal courts' rates of citation to their own states might speak most directly to their chances of survival as independent entities. In particular, high rates of citation to their own states could be a harbinger of reduction, or even demise, of tribal court jurisdiction.

This strong tendency could be the result of a number of conditions. Tribal court judges might be particularly well-versed in the laws of their own states. In addition, tribes might have better access to decisions issued by courts in their states than to the opinions of other United States courts. This superior access could be the result of geographic proximity or state-tribal court partnerships.<sup>131</sup>

<sup>128</sup> Billie v. Collins, CV 10-51, 2010 WL 4076348 (Sept. 13, 2010).

<sup>129</sup> Nissen v. Coquille Econ. Dev. Corp., C10-03, 2010 WL 4939527 (Dec. 3, 2010).

<sup>130</sup> Barsh, *supra* note 58, at 80 ("The frequency with which tribal courts rely on state law is troublesome, however, in the context of tribal courts' historical efforts to distinguish themselves from state courts, and justify their continued existence as separate judicial institutions.").

<sup>131</sup> Arnold, *supra* note 117. ("Just as important as the written agreements and new court procedures, tribal-state court forums have helped to open new lines of communication and improved relationships between tribal and state court judges, administrators, and practitioners.").

Tribal courts' overwhelming reliance on their own states could also be due to the fact that tribal and state courts have overlapping jurisdiction over a range of matters, from family law to criminal law.<sup>132</sup> As a result, the legal questions that arise in their adjudications, as well as the specific disputes themselves, may be the same. See Table 6 below for a summary of the findings on citations to United States courts.

**TABLE 6. Citations to United States Courts: Findings Summary**

<b>Total Number of Citations to <u>United States Courts</u></b>	<b>Number of Citations to Courts in Citing Tribe's <u>State(s)</u><sup>133</sup></b>	<b>Number of Citations to Courts in <u>Other States</u></b>	<b>Number of Citations to <u>Federal Circuit Courts</u></b>	<b>Number of Citations to the <u>United States Supreme Court</u></b>
508	194	53	98	163

Tribal courts devoted the other half of their United States citations to federal circuit courts and the United States Supreme Court. The Supreme Court was almost twice as popular as all circuit courts combined. While thirty-three percent of United States court citations were to Supreme Court decisions, only twenty percent were to circuit courts. This disparity may be due in some part to a greater number of tribes' viewing Supreme Court precedent as relevant, whereas circuit courts may only be considered persuasive by tribes in their jurisdictions. Tribal court judges may also be more aware of Supreme Court decisions because of greater publicity or emphasis in legal training.

<sup>132</sup> *Id.* at 2 (“[T]hese courts share overlapping legal jurisdiction—including shared authority to adjudicate matters and issue binding orders—in areas like domestic relations, criminal prosecution, and contracts.”).

<sup>133</sup> A tribe was generally considered to be associated with state(s) where their central government offices (courts, etc.) are located.

### ***D. Citations to Foreign Courts***

The three-year sample only included one citation to a foreign court.<sup>134</sup> Moreover, the foreign court is not in a distant land. It was neighboring Canada. Somewhat surprisingly, the citing court was the Navajo Supreme Court, which did not frequently cite beyond its own chambers. Indeed, almost all of the Navajo Supreme Court's citations (eighty-four percent)<sup>135</sup> were to opinions it issued itself. Even its one foreign court citation was somewhat self-referential. Its reference to the Canadian court was based on a lower Navajo court opinion<sup>136</sup> that discussed the Canadian opinion "at length."<sup>137</sup>

However, the Navajo Supreme Court opinion itself includes a detailed discussion of Canadian law and its relevance to the tribal customs involved in the child custody dispute at bar. The Navajo Supreme Court even faults the lower Navajo court for not sufficiently considering Canadian law. Its basis for this chastisement is that Canadian law should be used as a lodestar because its underlying principles mirror Navajo custom.<sup>138</sup> Specifically, the Navajo Supreme Court looked to Canada to establish that "tribal judges will look to the welfare of the child before the rights of a natural parent."<sup>139</sup>

That the one citation to a foreign court involved a matter of custom may initially seem counterintuitive. Arguably, custom is unique to each society. According to this view, foreign nations' cultural beliefs may be too alien to be relied upon. However, tribal courts might actually be particularly willing to cite further afield on customary matters because of a lack of legal precedent closer to home. In addition, decisions based on custom may be harder to explain because of weak

<sup>134</sup> *In re A.M.K.*, SC-CV-38-10, 194, 201, 2010 WL 4159270 ("See *Deer v. Okpik*, 4 Canadian Native L. Rep. 93 (Cour Supérieure de Quebec 1980) (explaining that tribal judges "will look to the welfare of the child before the rights of a natural parent").").

<sup>135</sup> The Navajo Supreme Court opinions in the study's three-year sample contained a total of 581 citations to legal precedent. Of these citations, 486 were self-referential.

<sup>136</sup> *Goldtooth v. Goldtooth*, 3 Nav. R. 223 (W.R.Dist.Ct.1982).

<sup>137</sup> *In re A.M.K.*, *supra* note 134.

<sup>138</sup> *Id.* at 200 ("The [lower Navajo] court further failed to consider the family law of Canada which closely tracks our own fundamental principles in its subordination of the right of parents to the best interest of the child and emphasis on extended family.").

<sup>139</sup> *Id.* at 201.

foundations in traditional legal logic. In these cases, wide-ranging citations might actually help establish legitimacy.<sup>140</sup>

According to the Navajo Supreme Court, not all external court citations are created equal. In particular, the Navajo Court emphasized Canadian law's superiority relative to United States law for family law matters: "The emphasis on extended family in both Navajo and Canadian law diverges markedly from the traditional Anglo-American nuclear vision."<sup>141</sup> However, this preference does not appear to apply to all Navajo Supreme Court adjudication. In the sample, the Navajo Supreme Court's citations relied far more heavily on United States precedent than Canadian (or other foreign) precedent. Its one citation to a Canadian court pales in comparison to its eighty-two citations to United States courts.

The Navajo Supreme Court, and tribal courts generally, are not unique in their limited reliance on foreign courts. For instance, the United States Supreme Court is often characterized as having an "aversion" to citing foreign courts.<sup>142</sup> Although they may have company, tribal courts' insular citation practices might be to their detriment. By overlooking external law, they may be "fail[ing] to make use of an important source of inspiration, one that enriches legal thinking, makes law more creative, and strengthens the democratic ties and foundations of different legal systems."<sup>143</sup>

## CONCLUSION

Taken together, this study's findings suggest that tribal courts have responded to their unenviable position at the intersection of two worlds by retreating to one. Essentially, they are islands in a jurisprudential archipelago. They rarely cited beyond tribal chambers—seventy percent of all citations were to tribal courts. And nearly all of these citations were self-referential, suggesting that each tribal court is secluded on its own island. Intertribal citation was almost non-

<sup>140</sup> In the Navajo case under discussion, one party (the father) was a Canadian citizen. This fact likely accounts in part for the Navajo court's deference to Canadian custom, although the opinion supports this citation by characterizing Canadian custom as similar to Navajo tradition.

<sup>141</sup> *In re A.M.K.*, *supra* note 134, at 200.

<sup>142</sup> Adam Liptak, *U.S. Court is Now Guiding Fewer Nations*, N.Y. TIMES, Sept. 17, 2008, at A1; see, e.g., *Atkins v. Virginia*, 536 U.S. 304, 342-325 (2002) (Rehnquist, C.J., dissenting); *Lawrence v. Texas*, 539 U.S. 558, 598 (Scalia, J., dissenting).

<sup>143</sup> Aharon Barak, *Foreword: A Judge on Judging: The Role of A Supreme Court in A Democracy*, 116 HARV. L. REV. 16, 114 (2002).



existent, only surpassed in its infrequency by citation to foreign courts. In the limited circumstances when tribal courts did look beyond their own rulings, they tended to stick close to home. Their citation practices suggest a preference for decisions issued by courts in their own states, over United States courts further afield.

These findings raise the question of whether tribal courts' insularity is the result of circumstances that may to some extent be beyond their control, such as limited access to opinions. This study's review of sources of tribal court opinions suggests that lack of access may indeed be a significant factor. The optimal source in terms of usability and comprehensiveness (WestlawNext) only contained opinions for a few dozen tribes, whereas 566 tribes are federally recognized and hundreds more are not.

The article's intertribal citation findings further support the theory that low citation rates are a function of poor access. The court responsible for the most instances of intertribal citation is a member of an intertribal court system. The judges that adjudicate for this tribe have extensive access to other member tribes' opinions—indeed, they write them. All of this tribe's intertribal citations were to tribes that also belong to the intertribal court system. In addition, according to a judge who sits on several tribal courts,<sup>144</sup> most tribal judges prefer citing other tribes to United States courts. This preference is based on the fact that tribes share cultural practices and some disputes common to tribes do not frequent United States courts. The judge claimed that the main reason tribal court judges do not rely more heavily on other tribes' opinions is lack of access.

If access is indeed the primary cause of tribes' low citation rates and tribes actually desire to cite more widely, then the pressing question becomes what can be done to help tribal courts escape their islands to become "a part of the main."<sup>145</sup> Answering this question could have serious implications for tribes, and for the growing number of non-tribal parties who fall within their courts' jurisdiction.<sup>146</sup> Crucially, the power to cite other courts extensively could help preserve tribal

<sup>144</sup> Interview with Judge BJ Jones, Chief Justice of the Turtle Mountain Tribal Court of Appeals, Special Magistrate of the Non-Removable Mille Lacs Band of Ojibwe Tribal Court, and alternate judge of the Three Affiliated Tribes Tribal Court (Mar. 8, 2013).

<sup>145</sup> JOHN DONNE, *No Man is an Island, Meditation XVII*, in DEVOTIONS UPON EMERGENT OCCASIONS (1624).

<sup>146</sup> *E.g.*, Violence Against Women Reauthorization Act of 2013, S. 47, 113th Cong. § 904 (2013) (enacted) (creating special domestic violence jurisdiction).

courts' severely limited resources.<sup>147, 148</sup> Citations to prior decisions can replace time-consuming step-by-step legal analysis and can substitute for re-explanation of frequently adjudicated rules of law.

Moreover, access to legal materials can shape the law itself. The ability to draw upon a broader supply of jurisprudence could help tribes respond to each dispute's unique circumstances with more nuance, and could create a richer tribal common law. Tribal courts might also be able to lean more heavily on their own customary law and tradition if they could more easily look to other tribal courts that have done so for support. And each tribe's body of customary law, in turn, could be strengthened over time through considered analysis and application. So ultimately, much is at stake in whether tribes resolve their current access limitations. With greater access, tribal courts could venture forth from their islands, better equipped to mete out tribal justice.

<sup>147</sup> See, e.g., Sophie Harnay & Alain Marciano, *Judicial Conformity Versus Dissidence: An Economic Analysis of Judicial Precedent*, 23 INT'L REV. L. & ECON. 405, 408 (2003) ("A precedent thus serves to economize on the costs of decision-making.").

<sup>148</sup> See, e.g., Douglas B.L. Endreson, *The Challenges Facing Tribal Courts Today*, 79 JUDICATURE 142, 145 (1995) ("[T]hese systems have historically been underfunded.").

### ADDENDUM—FUTURE RESEARCH

While this article will help bring greater visibility to the need for greater availability of tribal court opinions, its limited sample size and methodology leave room for additional, and more generalizable, analysis. For instance, an expanded timeframe (beyond this study's three-year scope) would facilitate longitudinal assessment of citation practices. Changes over time could reveal the impact of changes in the accessibility of opinions. The strength of the sample could also be improved by increasing the number of tribal courts included therein. Moreover, including tribes that have not chosen to publish their opinions on WestlawNext would help eliminate any bias associated with the willingness or wherewithal to make opinions available.

Increasing the breadth of materials analyzed could help contextualize this study's findings. A review of tribal legislation is particularly promising. At least one tribe has adopted a code that explicitly permits its tribal court to refer to other courts<sup>149</sup> and another has enacted legislation requiring the application of state law.<sup>150</sup> In addition, future research could review the portions of tribal constitutions creating tribal courts for directions as to how courts should treat external law. Some countries' constitutions contain such provisions: "The openness of some legal systems to foreign law is reflected in their constitutions. The South African Constitution ... says that courts interpreting its bill of rights "must consider international law" and "may consider foreign law.""<sup>151</sup>

The methodology could also be expanded beyond numerical review. For instance, the treatment of cited opinions could be assessed along a negative to positive continuum. Understanding whether external law is primarily cited as authority or as inapplicable would help reveal how tribal courts view themselves within larger legal communities. A high rate of positive treatment for citations to other tribes' opinions would support the view that there is in fact a "tribal common law." High rates of negative treatment would not necessarily counter this theory. The fact that judges mention another tribe's law at all suggests a commonality that

<sup>149</sup> Valencia-Weber, *supra* note 7, at 253 (according to the Sitka Tribe of Alaska Community Association Code and court rules, the Sitka Tribal Court "may refer to other sources of law for guidance, including the law of other tribes, federal, state or international.").

<sup>150</sup> Cross, *supra* note 52, at 80 ("Pequot tribal legislation directs the tribal courts to apply Connecticut law in private civil actions.").

<sup>151</sup> Liptak, *supra* note 142; Constitution of the Republic of South Africa Act 108 of 1996, Ch. 2, § 39.

invites cross-application. Arguably, the legal issues most frequently subject to positive treatment might form the core of any tribal common law.

Finally, future research should focus on determining what drives or hinders citation in practice. A large-scale standardized interview of tribal judges is the most promising approach. Tribal judges likely have informed opinions about what tribal courts and communities might stand to gain or lose from increased external citation. If it seems likely that the result would be a net gain, then judges could also be consulted for practical suggestions about how the most serious barriers to citation might be overcome.